

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
Referee Bruce Blake

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WABASH RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Jacob Lindt, Section Laborer, Maryville, Missouri, who was called upon to render service as Water Service Mechanic's Helper on January 26, 1940 and worked in that capacity from 7:15 A. M. to 11:15 P. M. with one hour off for lunch, and on January 27, 1940 from 7:15 A. M. to 4:15 P. M. with one hour off for lunch that he be paid for that service at Water Service Helper's rate—\$132.56 per month or 55 cents per hour—for 16 hours at pro rata rate and 7 hours at time and one-half rate."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing the date of the June 1, 1940 as to rules and rates of pay is in effect between the two parties. These rules cover the position to which Jacob Lindt was regularly assigned as a section laborer on Section No. 122, Maryville, Missouri.

"On January 26, 1940, Jacob Lindt was instructed to fill a temporary position of water service helper assisting the water service repairman in making repairs to water pipes at Maryville passenger station. Jacob Lindt worked 15 hours exclusive of meal period on January 26, 1940 and eight hours on January 27, 1940.

"When the job at Maryville Station was completed, Jacob Lindt resumed his regular duties as a section laborer on Section 122."

POSITION OF EMPLOYES: "Rule 35 of the agreement between the Wabash Railway Company and the Brotherhood of Maintenance of Way Employees effective June 1, 1940 covering composite service is hereinafter quoted:

'An employe working on more than one class of work on any day, will be allowed the rate applicable to the character of work preponderating for the day, except that when temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay will not be reduced.

'This rule not to permit using regularly assigned employes of a lower rate of pay for less than half of a work day period, to avoid payment of higher rate.'

"It should be kept in mind that Jacob Lindt was **regularly** assigned as section laborer, Section No. 122, Maryville, and his working conditions were covered by an agreement between the Carrier and the Organization.

restrict the right of the carrier to use laborers to perform common labor incidental to and in connection with the work of water service repairmen, but as a matter of fact definitely and clearly provides that laborers may be used to perform such work. In this connection, attention is invited to Article 23 of that agreement, copy of which is submitted herewith and made a part hereof as Carrier's Exhibit 'B'.

"Jacob Lindt was properly compensated for the service performed on the date in question, i. e., section laborer's rate.

"The claim for compensation at the rate paid water service helpers prior to January 1, 1940 is without basis, and should properly be denied."

OPINION OF BOARD: The essential facts of this case are not in dispute. Jacob Lindt, a Section Laborer, was assigned January 26 and 27, 1940 to assist a Water Service Repairman in making repairs on the heating plant used to furnish heat for the passenger depot at Maryville, Missouri. On January 26th he worked fifteen hours; on January 27th, 8 hours. For this service he was paid \$8.56 for the two days at the base rate of pay for Water Service Helper which had been \$132.56 (\$132.62) per month for all services rendered. Under the agreement of July 1, 1921, between the Carrier and the Organization, eight hours, exclusive of meal time, was declared to be a day's work.

Rule 36 of that agreement as amended by agreement of September 29, 1937, provides that:

"(a) Except as otherwise provided in the agreement effective July 1, 1921 or Paragraphs (b), (c) and (d) of this rule, time worked preceding or following and continuous with the regular eight (8) hour work period (exclusive of meal periods), shall be paid for at the rate of time and one-half computed on the actual minute basis."

Rule 57 of the agreement of July 1, 1921 provides:

"COMPOSITE SERVICE. An employe working on more than one class of work on any day, will be allowed the rate applicable to the character of work preponderating for the day, except that when temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay will not be reduced.

"This rule not to permit using regularly assigned employes of a lower rate of pay for less than half of a work day period, to avoid payment of higher rates."

By virtue of those rules petitioner contends that Lindt is entitled to time and a half for the seven hours' overtime based upon the rate of pay of Water Service Helpers.

The Carrier objects on several grounds. One is that there was no such position as Water Service Helper at the time in question. It appears that, by agreement effective January 1, 1940, Water Service Repairmen are now represented by Sheet Metal Workers' International Association. No mention is made in that agreement of Water Service Helpers. Rates of pay for Water Service Repairmen are established in the following manner:

"First year actual cumulative service.....	\$144.78
Second " " " "	152.08
Third " " " "	161.82
Fourth " " " "	173.98
Fifth " " " "	188.58"

While the Carrier actually paid Lindt for two days' service on the basis of the monthly pay (\$132.56) of Water Service Helper, it is probably not estopped, in the light of the agreement effective January 1, 1940, in now contending that the position of Water Service Helper ceased to exist as of that date. However, this objection goes to the form rather than the substance of the claim.

Nor is there any validity in the contention of the Carrier that Section 23 of the agreement effective January 1, 1940 permits the use of laborers to do the character of work performed by Lindt. The rule clearly contemplates the use of laborers in the performance of "common labor incidental to and in connection with the work of Water Service Repairmen."

The Carrier argues that the work performed by Lindt comes under the head of common labor. This contention is hardly tenable in view of the fact that the Carrier actually paid Lindt on the theory that the work performed was not common labor. However, conceding the Carrier is not now estopped in this contention, it is clear from the record that the work performed by Lindt was not common labor as that term is commonly understood and defined.

The Carrier contends that Lindt is not entitled to time and a half for overtime because he was taking the place of a man who was paid on a monthly basis for all work performed during the month. Therefore, it is urged, that, since an employe holding the position of Water Service Helper could not have claimed overtime, a substitute (such as Lindt) cannot.

To sustain this position would do violence to the letter and spirit of Rule 57 of the agreement of July 1, 1921, and Rule 36 of the agreement of September 29, 1937. Taking these rules at their face value it is clear that, when Lindt was assigned to assist the Water Service Repairman, he was entitled, under Rule 57, to be paid at the rate a regular assistant would be paid; and under Rule 36 (a) he was entitled to time and a half for overtime. The fact that the regular assistant, whether he be called "Water Service Helper" or "First year Repairman" is beside the question so far as Lindt's rights are concerned.

The Carrier also challenges the jurisdiction of the Board. This challenge is apparently based on the agreement effective January 1, 1940 whereby Water Service Repairmen come under the jurisdiction of Sheet Metal Workers' International Association. Lindt is a beneficiary under that agreement only to the extent of the wage scale provided therein for the kind of work he was called upon to perform. His rights arise from the provisions contained in Rules 57 and 36 of the agreement of July 1, 1921, and September 29, 1937, entered into between the Carrier and the Brotherhood of Maintenance of Way Employees. The latter is a proper party to invoke the jurisdiction of this Board since this claim involves a dispute between the Carrier and a maintenance of way employe.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That there has been a violation of the Rule in the Carrier's refusal to pay claimant on the basis of time and time and a half at the helper's rate

established and existing prior to January 1, 1940, for the work performed on January 26 and 27, 1940.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of November, 1941.